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CASE_____

IN THE SUPREME COURT
OFTHE UNITED STATES

EDUARDO E ROJAS ------PETITIONER

vs

IONICS,INC. ET.AL.,------RESPONDENTS

On Petition for writ of certiorari to the United States courts of appeals for the first circuit

---

Appendix to Petition for Writ of Certiorari

Volume I

EDUARDO E ROJAS

PRO-SE

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APPENDIX A

JUDGEMENT OF FIRST CIRCUIT

COURT OF APPEAL

United States Court of Appeals
For the First Circuit

No. 01-2505

EDUARDO E. ROJAS,

Plaintiff, Appellant,

V.

IONICS, INC., ET AL.,

Defendants, Appellees.

Before

Boudin, Chief Judge,
Torruella and Lipez, Circuit Judges.

JUDGEMENT

ENTERED ; JUNE 20, 2002

JUDGMENT

Entered: June 20, 2002

We have carefully reviewed the record in this case, including the briefs of the parties. We affirm the dismissal of the complaint, essentially for the reasons given by the magistrate judge in his report and recommendation, dated June 14, 2001, and by the district judge in his memorandum and order, dated September 5, 2001

Affirmed

by the Court:

Richard Cushing Donovan, Clerk

By: **JANICE M. O'NEIL**
Chief Deputy Clerk.

[cc: Mr. Rojas, Ms. Mercier, Certified Copies to: Honorable Mark Wolf and Mr. Anastas, Clerk, U.S. District Court of MA.]

APPENDIX B

MEMORANDUM AND ORDER

FIRST DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDUARDO E. ROJAS,)
Plaintiff,)
v) C.A. No. 00-12376-MLW
IONICS, INC., ET AL.,)
Defendant.

DOCKETED

MEMORANDUM AND ORDER

WOLF, D.J. September 5, 2001

On June 14, 2001, the Magistrate Judge issued a 25-page Report and Recommendation analyzing Defendant Ionics Inc.'s ("Ionics"), Motion to Dismiss the Amended Complaint and recommending that the motion be allowed. The court has carefully considered the Report and Recommendation, plaintiff Eduardo E. Rojas' original, pro se objections and his supplemental memorandum, which replies to Ionics' Opposition to Plaintiff's Objections and its opposition to Rojas' request to amend his complaint again.

The Report and Recommendation is persuasive and, therefore, is being adopted. As more fully set forth in the Report and Recommendation, the reasons for this decision are as follows. Rojas acknowledges that Count 3 of the Amended Compl .is not meritorious because M.G.L. c. 93A does not provide remedy for employment disputes. With regard to Count 1, even assuming, without finding, that Ionics owed a fiduciary duty to Rojas which is very doubtful his claim of a breach of that duty is barred by t.he three-year statute of limitations applicable to tort claims established by Massachusetts law. See M.G.L. c. 260, § 2A. Count 2 alleges, at best, a tort claim rather than a contract claim. Therefore, Count 2 is also barred by the three-year statute of limitations. Finally, as explained by the Magistrate Judge and by Ionics in its Opposition, even if Count 4 is construed as a claim made pursuant to M.G.L. c. 151B, it must be dismissed because Rojas failed to comply with the procedural requirements of that statute and, although they are not jurisdictional, there is not a valid reason to excuse Rojas' failure to satisfy those procedural requirements.

Rojas' request to amend his complaint again is also being denied. Because Rojas is representing himself, the court has liberally construed his pleadings. Nevertheless, it clearly appears that any possible amendment would be futile because the claims that Rojas seeks to allege are time-barred. Moreover, Rojas has been previously permitted to respond to a motion to dismiss by amending his complaint. It would not be in the interest of justice to allow him to do so again. Accordingly, it is hereby ORDERED that defendant Ionics Inc.'s Motion to Dismiss the Amended Complaint (Docket No. 15) is ALLOWED and plaintiff Eduardo Rojas' request to amend his complaint again is DENIED.'

"s/ MARK L WOLF " D.J.
UNITED STATES DISTRICT COURT

'The Amended Complaint also names three individual defendants. The docket indicates that none of them has been served. In any event, it appears that each would have at least the meritorious bases for dismissal that Ionics has asserted.

APPENDIX C

REPORT AND RECOMENDATION

FIRST DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDUARDO E. ROJAS,
Plaintiff,

v. CIVIL ACTION NO. 00-12376-MLW

IONICS, INC.,
Defendant.

REPORT AND RECOMMENDATION ON DEFENDANT IONICS, INCORPORATED'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (#15)

COLLINGS, Ch.U.S.M.J.

I. INTRODUCTION

On November 16, 2000, *prose* plaintiff Eduardo E. Rojas ("Rojas") filed a threecount complaint (#1) naming as parties defendant Ionics, Inc. ("Tonics"), Arthur Goldstein ("Goldstein"), Stephn I ("Korn"), and Marianne Winsser ("Winsser").[1] Ionics, a Massachusetts corporation, is the plaintiffs former employer; the three individually named defendants are employed by Ionics as the Chief Executive Officer, General Counsel and Human Resource Manager respectively.

In lieu of answering the complaint, Ionics filed a motion to dismiss, together with a memorandum in support, on January 4, 2001.2 (##3,4)

Eighteen days later Rojas submitted a document entitled "plaintiff (sic) motion to dismiss defendants (sic) counter claim motion" (#7) and a supporting memorandum of law (#8) in opposition to Ionics' dispositive motion. On February 7, 2001, the plaintiff filed a motion to amend the complaint which was allowed shortly thereafter by the District Judge to whom this case is assigned. In the amended complaint (~14), Rojas deleted one of the previously alleged claims[3] and added two more counts.

Ionics has again moved to dismiss (#15) and has filed a supplemental memorandum of law addressing the two new claims. (#17) Rojas has

1 Although not listed as parties in the caption, the trio of individuals were clearly identified as defendants in the introductory paragraphs of the original complaint.

2 From all that appears to date only the corporate defendant has been served with process. (#2)

3 The claim for misrepresentation was eliminated in the amended complaint.

countered the defendant's motion with a document entitled "plaintiff (sic) motion to dismiss defendants (sic) counter claim on amended complaint" (#19) and a memorandum of law. With the record now complete, the motion to dismiss the amended complaint is in a posture for resolution. This motion has been referred to the undersigned for issuance of a report and recommendation as to disposition pursuant to 28 U.S.C. §636(b).

II. The Facts

In a recent iteration the First Circuit explained the applicable standard as follows:

> A district court's allowance of motion to dismiss pursuant to Fed.R.Civ.P. 12~b)(6) is reviewed de novo. *Bessette v. Avco Fin. Sen's.,* Inc., 230 F.3d 439, 443 (1st Cir.2000). Like the district court, we must accept as true the factual allegations of the complaint and draw all reasonable inferences in favor of [the plaintiff]. *See id.* We will affirm the dismissal "only if, under the facts alleged, the plaintiff cannot recover on any viable theory." *Id.* (quoting *Garita Hotel Ltd. P'ship v. Ponce Fed. Bank,* 958 F.2d 15, 17 (1st Cir.1992) (internal quotation marks omitted)).

Blackstone Realty LLC v. F.D.I.C., 244 F.3d 193, 197 (1 Cir., 2001)(footnote omitted).

The place to begin is with a review of the allegations of the amended complaint.

In early September of 1967 Rojas accepted employment as a transformer designer in the engineering department of Ionics.[4] (#14 ¶8) Some twenty-four years later, in or around October, 1991, and then again in September, 1993,the plaintiff was granted certain stock options in accordance with the 1979 Stock Option Plan adopted by Ionics. (#14 ¶9, Exh. 2A and 2B)

According to Rojas, in early December of 1994 he was encouraged by a Mr. Kachadurian, then an executive vice president of Ionics, to retire early in order to take advantage of a lump sum pension which would be larger at that time than if he waited until what would be his normal retirement

two and a half years hence. (#14 ¶10) Mr. Kachadurian also offered the plaintiff a position with Ionics as a consultant after he retired at a salary of three thousand dollars a month for half time work plus health insurance and travel expenses. (#14 ¶11, Exh. 3) On or about December 16, 1994, defendant Winsser, Human Resources manager at Ionics, gave Rojas a Retiree

[4] The plaintiff actually alleges that he entered into an employment contract with the defendant at that time, referencing a letter from Ionics to him appended to the amended complaint as Exhibit 1.

The plaintiff references numerous documents throughout the amended complaint and has appended them as exhibits thereto. The First Circuit's lead shall be followed with respect to these documents: "Pursuant to Fed.R.Civ.P. 10(c), we treat these exhibits as ~a part [of the pleading] for all purposes,' including Fed.R.Civ.P. 12(b)(6). *McCaUion v. Lane,* 937 F.2d 694,696 (1st Cit. 1991)." *Black~tone Realty,* 244 F.3d at 195.

Distribution Election form to read and sign. (#14 ¶12. Exh. 4)

In February of 1995, Mr. Kachadurian advised the plaintiff that he had better exercise his vested options or he would lose them. (#14 ¶13) According to Rojas, Mr. Kachadurian explained that this action was necessary because the plaintiff was no longer a key employee. (#14 ¶13) Some eight months later Rojas wrote the following memorandum to defendant Goldstein:

THE REASON FOR THIS LETTER IS TO CLEAR UP SOMETHING THAT HAS BEEN ANNOYING ME SINCE I CHANGED MY STATUS OF EMPLOYMENT.

IN 1991 AND IN 1993 I WAS ISSUED 1000 SHARES.I ASSUMED THIS WAS A FORM OF COMPENSATION FOR MY DEDICATION TO THE COMPANY. THEN IN 1994 I DECIDED TO SEMI-RETIRE IN WHICH (SIC) I WAS INFORMED TO EXERCISE NON-RECALLABLE STOCK OPTIONS. I EXERCISED 600 SHARES FROM 1991, 200 SHARES FROM 1993 AND I LOST THE REST.

THE TERMS AND CONDITIONS STATE THAT THE SHARES ARE DISALLOWED ONCE AN EMPLOYEE IS FIRED OR LEAVES THE COMPANY. I REMAINWORKING FOR THE COMPANY PART-TIME AND ALSO FULL-TIME WHEN NEEDED.

MY CONCERN IS THAT I WAS AWARDED FOR MY MERITS LATE IN MY TIME AND IT WAS TAKEN AWAY BECAUSE I RETIRED AFTER 27 YEARS OF SERVICE. I FEEL THIS IS UNFAIR AND I ASK IF YOU COULD PLEASE LOOK INTO THIS MATTER AND SEE IF IT IS CONSISTENT WITH THE CORPORATION'S STOCK OPTION AGREEMENT.

Amended Complaint ~14 ¶14, Exh. 5.

Defendant Korn responded to the plaintiffs memo on January 8, 1997:

Ed

At Art's [Goldsteinl request, I have taken a look at the issues you raised. The facts, as I understand them are these: when you voluntarily retired from employment with the Company in 1994, you ceased your employment relationship with Ionics. If you

had remained an employee, you would not have been able to withdraw your funds from the Retirement Plan, as you did at the time.>

The work you have done for the Company since you retired has been as an independent contractor through your company, not as an employee (therefore there are no tax withholdings taken from your pay), and our stock option plan is available only to key employees. The shares remaining unexercised upon your retirement were still covered by the Company's buy-back rights, and we have an SPI which provides that if an employee voluntarily retires before normal retirement age, the Company will exercise its buy-back rights. Therefore, your treatment was consistent with the stock option plan, your stock option agreement and the SPI. Please let me know if you need any further information.

Amended Complaint #14 ¶15, Exh. 6.

More than six months thereafter in late July, 1997,

Rojas replied in writing to Korn:

Stephen:

I am taking this opportunity that work has slowed down a bit to discuss my early retirement and stock option issue.

I understand that there are some rules applicable to the option plan and if we go by these rules you are right.

Nevertheless, there are a few points that I want to discuss:

A. Prior to my retirement, 15 December 1994, I consulted with personnel about my advantages and disadvantages to retire early. All the facts were given to me. However, the stock options were not mentioned. They did not advise me that I had to exercise my stock options.

To my surprise, in January 1995, your Executive Vice-President Mr. Kachadurian informed me that I had to exercise my options or loose (sic) them. If I had know this I would not have retired..'~

B.My work as a contractor.
After I retired in December 1994,
Mr.Kachadurian offered me two options:

1. Twenty-eight weeks lump sum severance pay or
2. A three year contract at a rate of $3000 a month for one half time. No benefits, except. health insurance, travel expenses.

I accepted the contract option.

Amended Complaint ~14, ¶16, Exh. 7.

In January of 1998, Rojas, Goldstein, Korn and Winsser held a meeting. (#14 ¶17) During that meeting the plaintiff expressed his displeasure with the decision made by Goldstein in 1994, consequent to which he lost his stock options and other benefits. (#14 Cl7) Goldstein explained that once Rojas had retired he had ceased to be an employee of and thus had no right to the stock options. (#14 ¶18) In Goldstein's view, the plaintiff had done better financially by taking the early retirement

even with the loss of the stock options, but he agreed to look into the matter and make an adjustment if in fact the opposite was true. (#14 ¶18) When the investigation was completed, Korn wrote a letter dated February 5, 1998 to Rojas, wherein he wrote in pertinent part:

> As Art [Goldstein] promised you, Marianne Manzon Winsser and I have reviewed the history of your decision to retire as an active employee at the end of 1994 and the consequences of that decision to you and your financial position.
>
> The attached sheet was prepared to illustrate the fact that the primary economic benefit you obtained as a result of your early retirement use of a very favorable discount rate to establish your lump sum retirement distribution, plus early receipt of that distribution more than outweighed your giving up non-vested stock options for 2,400 shares.
>
> I must therefore conclude that the additional benefits you received from retiring in 1994 are greater than the value of the options you gave up.

Moreover, the additional benefit you were given of having to pay only the employee contribution, and not the full COBRA amount, during the 18 months of COBRA coverage following your retirement was equivalent to paying you an additional S3,700 in benefits not normally paid to a retiree.

In conclusion, it is clear you made an appropriate economic decision when you took an early retirement and gave up certain options. Furthermore, our review has shown, and I think you will agree, that Ionics had treated you more than fairly, in a way that valued and recognized your long and dedicated years of service.

Amended Complaint #14 ¶19, Exh. 8.

Approximately one year later, upon hearing rumors that he would not be given any further work assignments, the plaintiff contacted the IRS and was advised to file an SS8 form. (#14 ¶20) Rojas did so in July of 1999, forwarding to the IRS the form

as well as proof of his relationship with, and the work done for, Ionics from 1995 through February, 1999. (#14 ¶21, Exh. 9A-E and 10) The IRS determined that Rojas was an independent contractor vis-a-vis Ionics, and so informed him by letter dated February 10, 2000. (#14 ¶22, Exh. 11) Based on the IRS determination, the plaintiff sent an invoice to the treasurer of Ionics seeking an upward adjustment in the rates he had billed from December of 1994 until February of 1999. (#14 ¶23, Exh. 12) According to Rojas, he had billed Ionics at a lower, employee rate throughout that period rather than at a higher, independent contractor rate. (#14 ¶23, Exh. 12)

In or around June of 2000, the plaintiff was in contact with other workers from Ionics who had retired at about the same time as he had, who had also taken a lump sum retirement and then continued to work part-time, but who were classified as employees as opposed to independent contractors. (#14 ¶24) In early July, 2000, Rojas authored another letter to Goldstein which reads, in part,

Dear Art:

As a result of further investigation about my earlier retirement in December 1994 and its handling by the administration, I have come to the conclusion that

1 I was improperly informed of certain retirement benefits.

2 Improperly advice (sic) as to the exercising of stock options

3 and Improperly treated as an employee during my work after early retirement.

For the last few years while being employed by Ionics, I have tried to reason with you and the administration, and I have gotten nothing but frustration and pain seeing that after 30 years of dedication and honesty to the company, the Management including you toss me away, refusing to give me what I have earned~

Once more I do beg you to look seriously into this problem and realize that if there is not an agreement to pay my benefits as it stand (sic) today, in the next 15 DAYS I have no choice but to initiate a lawsuit against the COMPANY.

Amended Complaint #14 ¶25, Exh. 13.

A little over one week later, defendant Korn

responded on behalf of defendant Goldstein,

Stating inter alia that:

The fact is that you voluntarily ceased your employment relationship with Ionics at the end of 1994. You could not have received your retirement benefits if you had remained an employee, and you chose to retire when you did in order to maximize your retirement benefits. The work you performed for Ionics since 1994 was as an independent contractor, as confirmed by the IRS.

Far from acting in bad faith, Ionics tried to assist you by permitting you to work as an independent contractor even after you retired and took your Retirement Plan benefits. The fact that your stock options would no longer be exercisable after you ended your employment relationship was dearly set forth in your stock option agreements and in the stock option plan, a copy of which you received with each of the option agreements. Ionics owes you no further obligations.

Amended Complaint #14 ¶26-8, Exh. 14.

The plaintiff alleges that Ionics invoked a lot of excuses, for example, that he was no longer a key employee after retirement, so as to avoid giving him his stock options. (#14 ¶29) It is contended that "[a]ll these excuses confirm that the Defendant had Misrepresented (sic) and mislead the Plaintiff with the Intention (sic) to defraud him." (#14 ¶30) Rojas claims that he had a right to be classified

and maintained as an employee after his retirement as had other employees who had retired without stock options. (#14 ¶31) The company's view that the plaintiff was an independent contractor is a "pretext" unsupported by a contract or appropriate rates of pay according to Rojas. (#14 page 32-35)

Lastly the plaintiff advances the following allegations:

> If Mr. Kachadurian perpetuated this action of Fraud (sic) in 1994, it could have Been (sic) resolved in 1996, or January 1998 when the plaintiff asked for the Remaining (sic) 2400 shares vested, but the Administration rather than recognize the error or Negligence (sic) it went on with an excuse, good enough to hide the Bad (sic) faith and malice Whether (sic) the Motive (sic) was cause by Reprisal (sic), for being associated to Mr. Kachadurian .

> Racial (sic), because the Spanish background of the Plaintiff, or Age (sic), which may have Been not the Motive (sic) but it could be very well the difference as the Plaintiff (sic) age was Under (sic) the federal and State protective rules of law.
>
> Regardless what the Motive (sic) was the Action (sic) of the Defendant has been willful With(sic) reckless disregard to Massachusetts and federal Discrimination (sic) law. With The Intention (sic) to take away what truly belongs to him.

Amended Complaint #14 ¶36-7.

With a review of the allegations complete, it is time to turn to the claims advanced.

III. The Amended Complaint

In Count I of the amended complaint, the plaintiff asserts a claim for breach of fiduciary duty

Although not specifically stated, it is apparent from

the context of the allegations that the time at which this purported breach occurred was in December, 1994, i.e., when Rojas took an early retirement at the age of sixty-three and a half. (#14 ¶41) The plaintiff claims that he did not become an independent contractor then, but rather that his employment status with Ionics remained the same "and as[s] such the Stock Option agreement was in force." (#14 ¶42) It is alleged that "[the defendant breached his (sic) fiduciary obligation in not notifying the Plaintiff ever [t]hat it was recalling the [o]ptions and terminating the contract in writing". [7] (#14¶43, 45)

7 The citation to assertion of the uniform Commercial Code, Mass. Gen .Lc 106, & 1-205 (6), in support of this legal proposition is , of course, inapposite. There is no commercial transaction at issue in this case.

Next in Count II it is alleged that the defendant breached the covenant of good faith and fair dealing implied in the option agreement. (#14 ¶47) More particularly, Rojas contends that Ionics breached the stock option agreement "under false pretense and in [violation of sections (sic) 10(b) of the stock option plan [b]y denying the Plaintiff [t]he right to the status on employment (sic) [w]hich was arbitrarily and illegally taken [a]way as result (sic) of early withdraw (sic) of pension fund." (#14 ¶**50**)[8]

[8] The citation to a section of the Uniform Commercial Code, Mass. Gen. L. c. 106, §1-205(6). in support of this legal proposition is, of course, inapposite. There is no commercial transaction at issue in this case.

Again the citation to the Uniform Commercial Code is not legally sound.

It is claimed that Ionics engaged in unfair and

deceptive acts or practices in violation of Mass. Gen. L. c. 93A in Count III. Specifically, Rojas alleges that

> a. The defendant breached his (sic) fiduciary obligation to notify the Plaintiff [un writing (sic) the [c]ancellation of the [a] greement and reasons for doing it [p]rior to the cancellation.
>
> b. The defendant breached its contract with the Plaintiff.
>
> c. The [d] efendant made misrepresentation (sic) in regard to the true reason for [h] aving recall (sic) the [s]tock options.
>
> d. The defendant retained the Plaintiff (sic) vested [s]tock [o]ptions in willful [disregard of (sic) his demand in the meeting of January 1998 and mislead (sic) him [i]nto believing that the decision made in 1994 was better by obtaining [a] higher lump [s]um pension fund [o]f $22000, which in fact the [d]efendant [k]new that it was not true.

> e. The defendant using unscrupulous scheme misled (sic) the plaintiff into believing [t]hat early retirement was the reason to have the employment status changed and [h]igher [l]ump sum [e]arly withdrawal of pension fund(sic) was the reason to give up the [o]ptions [when in fact neither have anything in common, nor are interchangeable (sic).

Amended Complaint #14 ¶56.

The plaintiff is seeking three times the amount of his actual damages as a consequence of this purported statutory violation.

Finally in Count IV Rojas advances a claim for age discrimination. The gist of this claim seems to be that the plaintiff was terminated as an independent contractor by the defendant in July of either 1999 or 2000 when he was sixty-eight years old. (#14 ¶'62-4)

It is alleged that Ionics "in July 1999 and July 2000 breached the agreement made in 1967 [o]f terminating the relationship in a friendly and professional terms (sic) with proper [n]otification and cancellation of all the contractual obligations agreed under employment (sic)." (#14 ¶60) Further, "[t]he [d]efendant terminated the plaintiff (sic) work in July 1999 without any notification, [c]losing his office and removing all files including his personal files, because the Plaintiff had gone to the IRS for a status determination." (#14 ¶62) Moreover, "[i]n July 2000 the [d]efendant, rather than negotiate a just settlement choose (sic) to [t]erminate the plaintiff by denying his right to the fruit of his work." (#14 ¶63)

At the time of his termination Rojas asserts that "[t]he defendant without any consideration of the Plaintiff (sic) age and showing [m]alice [w]ith reckless indifference is in [v]iolation of MGL chapter 93 section 103(a)." (#14 ¶65)

V. Discussion

Although not raised by the defendant, a cursory review of the allegations of the amended complaint immediately raises a threshold issue as to whether Rojas' state law claims fall within the purview of the Employee Retirement Income Security Act ("ERISA") and are, consequently, pre-empted. The First Circuit has had occasion to address the fundamentals of ERISA pre-emption:

Congress enacted ERISA in 1974 in order "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). In particular, ERISA was designed to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance employee benefits. *See Fort Halifax Packing Co.* v. *Coyne,* 482 U.S. 1, 15, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987). The law was also intended to safeguard employers' interests by "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Show,* 463 U.S. at 99, 103 S.Ct. 2890 (quoting 120 Cong. Rec. 29197, 29933 (1974)) (internal quotation marks omitted). In support of this second goal, ERJSA provided for the preemption of all state law causes of action "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). ERISA preemption analysis thus involves two central questions: (1) whether the plan at issue is an "employee benefit plan" and (2) whether the cause of action "relates to" this employee benefit plan. *See Rosario-Cordero v. Crowley Towing & Transp. Co.,* 46 F.3d 120, 124(1sCir. 1995).*McMahon v. Digital Equipnient Corp.,* 162 F.3d 28,

35-6 (1998); *Hampers v.W.R. Grace & Co., Inc.*,202 F.3d 44, 48-9 (1 Cir., 2000).

Research reveals that courts have universally concluded that stock option plans such as the one in this case are not employee benefit plans. *See Raskin v. Cynet, Inc.,* 131 F.Supp 2d 906 (S.D Tex., 2001); *Hahn v. N~tional Westminster Bank, N.A.,* 99 F.Supp.2d 275 (E.D.N.Y., 2000): *Long v. Excel Telecommunications Corp.,* 2000 WL 1562808 (N.D.Tex); *Kaelin v. Tenneco, Inc.,* 28 F. Supp 2d 478, (N.D. Ill., *1998)Goodrich v. CML Fiberoptics, Inc.,* 990 F.Supp. 48 (D. Mass., *1998);Johnsonv. TCOM Systems, Inc.,* 1989 WL517870 (D.D.C.) The rationale of these cases is persuasive; the plaintiffs state law claims are not subject to pre-emption and each shall be addressed in turn.

The defendant argues that Rojas' claim for breach of fiduciary duty, Count I of the complaint, is barred by the three year statute of limitations in tort actions under Massachusetts law. *See* Mass. Gen. L . c. 260 §2A. Ionics' point is well taken. It is clear from the allegations that this cause of action accrued either in December, 1994 when the plaintiff took an early retirement, in February, 1995 when Mr. Kachadurian warned Rojas that he had to exercise his vested options or at least no later than January, 1997 when Korn detailed the company's position in a letter to the plaintiff. Indeed, Rojas acknowledged in a July, 1997 letter that if the rules of the stock option plan were to be followed that Ionics' view was correct.

There is nothing alleged from which fraudulent misrepresentation or concealment such as may toll the running of the statute could be inferred. Rojas knew the company's position from the begjnning, and it was reiterated to him, unaltered, on several different occasions. While the plaintiff may have hoped to persuade Goldstein to change his mind, such aspirations would not stop the running of the statute of limitations.

Viewing the allegations in the light most favorable to the plaintiff, the limitations period on the breach of fiduciary duty claim began to run no later than in January of 1997. The present case was instituted on November 16, 2000.

approximately eleven months after the three year statute of limitations had run. Count I of the amended complaint must be dismissed as untimely. *See, e.g., Blackstone Realty LLC v. Federal Deposit Insurance Corporation,* 244 F.3d 193, 197 (1 Cir., 2001); *State Street Bank And Trust Company,* 240 F.3d 83, 87 (1 Cir., 2001); *LaChapelle v. Berkshire Life Ins. Co.,* 142 F.3d 507, 509 (1 Cir., 1998) ("Granting a motion to dismiss based on a limitations defense is entirely appropriate when the pleader's allegations leave no doubt that an asserted claim is time-barred. *See, e.g., Street v. Vose,* 936 F.2d 38, 39 (1st Cir.199 1); *Kali Seafood, Inc. v. Howe Corp.,* 887 F.2d 7, 9 (1st Cir.1989).").

Although denominated a breach of contract claim, it is difficult to discern precisely what breach is being alleged in Count II. Rojas contends that Ionics breached the stock option plan by denying him the status of an employee after he took an early retirement. The plaintiff does not dispute that in December, 24 1994, he did in fact retire and take a lump sum pension benefit. At that time the plaintiff had copies of the stock option agreements and the 1979 stock option plan in his possession) Years later in 1997 Rojas admitted in a letter to Korn that Ionics' view of how the plan worked was correct, specifically stating "I understand that there are some rules applicable to the option plan and if we go by these rules you are right." (#14, Exh. 7) ~

The action of denying Rojas employee status subsequent to his retirement, even if accepted as true, simply cannot be viewed as a breach of the stock option provision relating to the employee's rights to exercise the options as alleged. (#14, #2B at p.4) Indeed, the crux of the plaintiffs claim does not seem to be that the stock option plan itself was improperly implemented or administered, but rather that Ionics took actions which effectively denied him the benefits of the plan. Such a claim quite simply is not one for breach of contract. While theoretically such a claim may be more in the nature of a tort, that does not help Rojas since any tort would be barred by the three year statute of limitations.

The allegations in Count II fail to state a cause of action for breach of contract. As a result, the count should be dismissed.

Count III of the amended complaint is brought under Mass. Gen. L. c. 93A. The allegations make clear, however, that the claim arises out of Rojas' employment relationship with Ionics prior to the time that he took early retirement.[9] The purported unfair and deceptive practices all involve the plaintiffs alleged employment contract with Ionics as well as his early retirement and its consequences. The Massachusetts Supreme Judicial Court has unequivocally determined that :

> we have previously stated that c. 93A "is a statute of broad impact which creates new substantive rights and provides new procedural devices for the enforcement of those rights

." *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693, 322 N.E.2d 768 (1975).

[9] In other words, all the events about which Rojas complains occurred while, or relate to when, he was an employee of Ionics before his status was changed to that of an independent contractor.

However, broad as this protection is, we believe that the Legislature did not intend the statute to cover employment contract disputes between employers and the employees who work in the employer's organization, nor to disputes between members of that organization arising out of the employment relationship. Although the statutory language is not without ambiguity, we interpret the reference in §11 to unfair or deceptive acts committed by ~another person who engages in any trade or commerce" to refer to marketplace transactions and not to claims arising from the ordinarily cooperative circumstances of the employment relationship between an employee and the organization of which he is a member. *Id.* at 695-697, 322 N.E.2d 768. Section 11 remedies are available "in the case of a businessman [who suffers a loss] as a result of the employment by another businessman of either an unfair or deceptive act or practice or of an unfair method of competition." *Id.* at 696-697, 322 N.E.2d 768 (emphasis added).

Manning v. Zuckerman, 388 Mass. 8, 12-3, 444 N.E.2d 1262, 1265 (1983); see *also Falinouth Ob-Gyn Associates, Inc. v. Abisla,* 417 Mass. 176, 176 n. 1, 629 N.E.2d 291, 291 n.1 (1994).

Count III fails to state a claim upon which relief may be granted and should be dismissed.

Lastly in Count IV Rojas alleges what appears to be an age discrimination claim in violation of the Massachusetts Equal Rights Act, Mass. Gen. L. c. 93, §103. That statute, however, is not the appropriate vehicle to carry the claim. Rather, Mass. Gen. L. c. 151B provides the exclusive remedy for employment discrimination claims comparable to the one asserted. *See, e.g., Charland v. Muzi Motors, Inc.,* 417 Mass. 580, 586, 631 N.E.2d 555, 559 (1994):

Reidy v. Travelers Ins. Co., 928 F.Supp. 98, 106 (D. Mass., 1996), *affd,* 107 F.3d 1 (1 Cir., 1997), *cert. denied,* 522 U.S. 809 (1997) ("Because M.G.L. c.h.151b is the exclusive state law remedy for employment discrimination complaints, it preempts claims brought under M.G.L. c. 93, § 103. *See Woods v. Friction Materials, Inc.*, 30 F.3d 255, 264 (1st Cir.1994).").

Ionics argues that this count must be dismissed because Rojas has not alleged that he complied with the procedural requirements of chapter 15 lB. In other words, there is no contention by the plaintiff that he has ever filed a charge of discrimination with the Massachusetts Commission

AgainstDiscrimination ("MCAD")

, much less one "within six months after the alleged act of discrimination". *See* Mass. Gen. L. c. 151B §5. The consequences of this failure are fatal to the plaintiffs claim:

[Under Massachusetts caselaw, it is clear that a plaintiff alleging employment discrimination has "two largely independent avenues for redress one through the MCAD and the other in the courts." *Christo v. Edward C. Boyle Ins. Agency, Inc.,* 402 Mass. 815, 817, 525 N.E.2d 643 (1988). A plaintiff "may maintain a civil action only if [he] has previously filed a timely complaint with the[MCAD]and ninety days have passed (or a commissioner has assented [in writing] to an earlier filing)." *Id.* at 816, 525 N.E.2d 643; M.G.L. c. 151B, §9. A plaintiff may not otherwise resort to the courts for a discrimination claim that is within the jurisdiction of the MCAD unless he has followed these procedures. *See Cliarland,* 417 Mass. at 583-584, 631 N.E.2d 555.

Reidv, 928 F.Supp. at 106-7.

Count IV must be dismissed for failure to comply with both the administrative prerequisites and time constraints of Mass. Gen. L. c. 151B.

V. Recommendation

For the reasons stated I RECOMMEND that the Motion Of Defendant Ionics, Incorporated To Dismiss Plaintiffs Amended Complaint (#15) be ALLOWED.

VI. Review by the District Judge

The parties are hereby advised that pursuant to Rule 72, Fed. R. Civ. P., any party who objects to these proposed findings and recommendations must file a specific written objections thereto with the Clerk of this Court within 10 days of the party's

receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings , recommendations, or report to which the objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Fed. R. Civ. P., shall preclude further appellate review. *See Keating v. Secretary of Health and Human Services,* 848 F.2d 271 (1 Cir., 1988); *United* States *v. Emil iano Valencia-Copete,* 792 F.2d 4(1 Cir., 1986); *ParkMotor Mart Inc. v. Ford Motor Co.,* 616 F.2d 603 (1 Cir., 1980); *United States v. Vega,* 678 F.2d 376, 378-379 (1 Cir., 1982); *Scott v. Schweiker,* 702 F.2d 13, 14 (1 Cir., 1983); *see also Thomas v. Am,* 474 U.S. 140 (1985)

"s / ROBERT B. COLLINGS"
Chief U.S. Magistrate Judge

June 14, 2001.

United States District Court
District of Massachusetts

EDUARDO E. ROJAS,
Plaintiff,

v

CIVIL ACTION NO.
OO-12376-MLW

IONICS, INC.,
Defendant.

ORDER RETURNING CASE TO CLERK'S OFFICE

COLLINGS, Ch.U.S.M.J.

The undersigned has this date issued a Report and Recommendation that this case be dismissed. Accordingly, the file is RETURNED to the Clerk's Office with instructions to bring the Report and Recommendation to the attention of Judge Wolf.

The Clerk shall enter on the docket the fact that the case "is no longer referred to Magistrate Judge Collings."

"s/ROBERT B . COLLINGS "

Chief U.S. Magistrate Judge

June 14,2001